THE LAW SOCIETY of SCOTLAND
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Discussion Paper: Response

Scottish Law Commission Discussion Paper 159: Compulsory Purchase

The Law Society of Scotland's Response

June 2015

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and out with the solicitor profession.

The Society's Planning Law, Property and Land Law Reform, Rural Affairs and Property Committees welcome the opportunity to consider and respond to the Scottish Law Commission's Discussion Paper on Compulsory Purchase (Paper 159). We have the following responses to the questions as set out within the Discussion Paper:

General comments:

We acknowledge that a great deal of work has gone into the preparation and publication of this very carefully considered Discussion Paper as part of its Eighth Programme of Law Reform on a public law matter which would benefit greatly from the repeal of a wide range of existing provisions and the enactment of a consolidated statute.

Comments:

PART 1 INTRODUCTORY AND GENERAL

1. The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.

We welcome the repeal and the replacement of compulsory purchase legislation and the compensation code with a new statute. We do not under-estimate the complexity of such an undertaking, but believe that a properly drafted Bill could result in a more efficient and fairer system of compulsory purchase and compensation which benefits the economy and social justice.

Chapter 2 General issues

2. For the purposes of compulsory purchase, is the current definition of "land", set out in the 2010 Act, satisfactory?

No. We have concerns that the current definition of land in the Interpretation and Legislative Reform (Scotland) Act 2010 would appear to be too restrictive in its terms and should include airspace rights. The definition of land in the Town and Country Planning (Scotland) Act 1997 includes servitudes. There has to be a commonality of definition of land which is sufficiently broad to encompass any anticipated rights which a project may have to acquire.

3. Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?

Yes. Such rights could encompass both temporary rights to enable construction to take place, but also permanent rights which, although necessary, do not require outright ownership which is important for the purposes of ECHR as only minimum interest should be compulsorily acquired. There is uncertainty as to the nature of new rights which are compulsorily acquired and their relationship to such rights that can be created either statutorily or by prescription. The creation of servitudes under CPO presents some difficulties in reconciling these with servitudes created voluntarily. Specific reference to Section 27 of the Forth Crossing Act 2011 is made. Rather than relying upon the creation of servitude under an enabling Act, this adopts the procedure with some amendments for the creation of a servitude under Section 75 of the Title Conditions (Scotland) Act 2003. Our concern is that there is a requirement under Section 75 for there to be a benefit to property. We consider that a servitude right should not, for the purposes of its existence, require a benefited property.

We believe that there should be a list of types of rights which can be acquired and also specification of those rights which cannot be acquired.

Additional provisions would also be required to protect the exercise of the servitude from any interference by the owner over which the servitude has been taken.

4. What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?

We refer to our response at question 3 above.

5. Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?

Yes, we consider such a power would be useful. We are aware of it having been used in the Edinburgh tram project and consider it is a pragmatic solution to situations where access or storage space are required only during construction. It avoids the acquiring authority having to incur the costs of outright purchase and it is also likely to reduce claims for injurious affection or blight as it is only a temporary measure.

That said, it is important that any such use should be adequately compensated. We do not offer suggestions on the proper valuation of such a claim but it is clear that in some cases the disruption could be so significant as to completely inhibit a previous use of the land. Might a right to seek sale be helpful? Should it include the creation of new rights too (e.g. servitude)?

In addition, the current system of having temporary possessions dis-applies the compensation code and there is a prospect for abuse and unfairness to affected owners. Therefore, this particular right should be subject to specifically defined proposals that shall relate primarily to construction works.

Chapter 3 Human rights

6. The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.

Yes. We agree that it should be, rather than the position that we have which is a sequential reference back to older statutes. This, of course, causes difficulties in the understanding of the public at large that their right to compensation applies.

We therefore suggest that this right to compensation as the result of compulsory purchase should be placed on the face of the new statute.

7. Do consultees agree with our view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention?

Yes we agree that the current statutory framework is ECHR compatible, but that compatibility does not rely solely upon the supervisory jurisdiction of the courts. It also requires an adherence to the affected person's rights to be heard in objection to a decision of Ministers where the dispossession of the individual's property is at stake.

PART 2: OBTAINING AND IMPLEMENTING A CPO; THE MINING CODE

Chapter 5 Procedure for obtaining a CPO

8. Compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.

Yes, we agree. We consider that standardisation of the procedures would be of advantage to practitioners and the public alike.

9. Is there any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B?

We do not believe there is any reason why the proposed procedures should not be used. We refer to our comments at question 8 above.

10. Is there any relevant legislation missing from that list?

The table of current legislation conferring powers of compulsory purchase in Scotland at Appendix B is comprehensive and we have no comments to make.

11. Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?

The extent to which the powers of survey in section 83 are used is unclear. Many CPOs are promoted for roads purposes and there is a separate power of entry under section 140 of

the Roads (Scotland) Act 1984 to enter land to undertake survey and boring activities for boring purposes.

It is also noted that private bills authorising railways in Scotland have tended to include bespoke survey powers rather than relying on section 83 (for example, section 28 of the Airdrie-Bathgate Railway and Linked Improvements Act 2007. The rights of access granted in terms of private bills have tended to be have been more extensive than under section 783, perhaps indicating that the powers in section 83 are not adequate.

Such extended powers have included, for example, the right to place and leave apparatus on land, as well as the right to undertake archaeological investigations. We would suggest that consideration is given to giving such wider powers of entry for all CPO schemes. It would be helpful to have specific powers of entry available in advance of the drafting of the CPO to identify the extent of the land to be acquired, subject to the usual safeguards of prior notice and compensation for damage, if any.

12. Is the current list of statutory objectors satisfactory and, if not, what changes should be made, and why?

It is not clear what status an objection has if the original objector dies, becomes incapax, or is in administration. Can the objection continue to be maintained in such circumstances?

13. Should there be any further restrictions on the circumstances in which a statutory objector can insist upon a hearing or inquiry?

We would recommend that a cautious approach is taken to any restrictions on the right to a hearing or inquiry. In the case of Bryan v United Kingdom (1995) 21 EHRR 342, the European Court of Human Rights considered the adequacy of legal review by the High Court in order to secure compliance with Article 6. In finding that there was compliance with Article 6 in the context of an appeal against a planning enforcement notice, the Court found it was necessary to have regard to the whole process. This included matters such as the subject matter of the decision, the manner in which the decision was arrived at, and the uncontested safeguards attending the procedure before the inspector including the quasi-judicial character of the proceedings, the duty incumbent on each inspector to exercise independent judgement, the requirement that inspectors must not be subject to improper

influence and the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality.

It was not therefore availability of judicial review which by itself gave Article 6 compliance. It was the overall process in the context of the type of decision (including its quasi-judicial nature) coupled with the right to legal challenge. Restricting the right to a hearing reduces the quasi-judicial aspect of proceedings. In a compulsory purchase process - where the subject matter is the compulsory acquisition of property. We consider that such a restriction could increase the risk that the procedure would be found to be non-compliant with Article 6 of the ECHR (Right to a Fair Hearing). Therefore, the right to be heard at a hearing or inquiry should be maintained.

Having said that, members have the experience of CPO procedures which have arguably been unnecessarily protracted through late withdrawal of objections where objectors had not initially understood the CPO and withdrew their objections when this was explained. By that time, the public inquiry has been organised and had to proceed notwithstanding that objections had been withdrawn. This does not seem to be a good use of public resources and provision should perhaps be made for the cancellation of public inquiries in these circumstances.

14. Should the proposed new statute provide that Scottish Ministers must refer cases to the DPEA within a specified time limit and, if so, within what time limit?

Yes, we agree that there should be a time limit. We would suggest that this should be the same as in planning appeals within three months.

15. Should the DPEA have discretion over the process for determining objections to a CPO similar to that which they have in relation to planning matters?

We refer to our answer to question 13. The right of statutory objectors to be heard should be maintained. We have concerns over applying the procedure currently used in planning appeals and development plan examinations to CPO processes. With development plans, an objector has no entitlement to make any further representations beyond the terms of their initial representation. The availability of any further procedure is entirely at the discretion of the Reporter. The vast majority of development plan representations are dealt

with without any form of further procedure and further discussion between the planning authority and objectors is discouraged. Similarly, the vast majority of planning appeals are dealt with on the basis of the initial grounds of appeal and the response from the planning authority. The focus of development plan and appeal procedures has been on front-loading the process with further procedure being the exception.

We question whether this expedited form of process is appropriate for dealing with the potentially severe interference with property rights which may result from compulsory purchase. We refer to our comments above on Article 6 compliance.

There is also a significant difference between the nature of a dispute in compulsory purchase and planning processes. In the latter, whilst there may be some scope for agreement between the parties, this tends to be more in the nature of narrowing the issues in dispute with a fundamental change in position being comparatively unusual. With compulsory purchase, there can be significant changes in the parties' positions during the objection process which often leads to the withdrawal of objections. The objection process needs to be flexible enough to allow parties to develop their cases in this way.

Furthermore, the technical nature of compulsory purchase orders means that the practical nature of the impact of a compulsory acquisition on a plot may not be apparent from the terms of the order itself. It is sometimes only when the promoting authority responds to an objection that the objector may understand the purpose of the acquisition and can properly formulate their objection or enter into meaningful discussions with the promoter. Any changes to the objection system needs to recognise the time constraints under which the promoter may be required to act and the limited information which may initially be available to objectors. There must be a fair procedure by which the terms of objections may be developed and negotiated. Experience shows that this need not necessarily lead to a lengthy process as discussions between the parties often lead to withdrawal of objections and a shorter period of time being required for Reporters to prepare their recommendations for Scottish Ministers.

16. The timescales for the process of securing CPOs should continue to be set out in subordinate legislation.

We agree, subject to the proviso that they should be readily ascertainable by the public.

17. Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?

We agree that the Scottish Ministers should be required to confirm CPOs where statutory objections have been made.

We also suggest that where the CPO has not had any objections then the acquiring authority could confirm its own CPO – this is similar to the Stopping Up Order procedure.

18. Are the current requirements for advertisement and notification of the making or confirming of a CPO satisfactory and, if not, what changes should be made, and why?

We suggest that the pro forma advertisement and notice should be updated, otherwise the procedure is acceptable.

19. An acquiring authority should be able to revoke a CPO.

We agree that this would be a sensible approach otherwise the CPO will be effective for a period of three years from the date of confirmation.

20. Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?

We agree that some degree of control would be appropriate, so that owners do not find themselves the subject of repeated CPOs. However, we would suggest that this could not be unduly restrictive as it may give rise to difficulties if a scheme was being promoted by one particular administration and several changes of administration ensued.

Also, there are occasions where a CPO is revoked because there is a funding problem for the development proposals which require the CPO. If the funding problems are resolved then the development proposals should not be so delayed.

21. Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses.

We agree that it would be reasonable to allow for recovery of reasonable expenses where a CPO is revoked. Whilst the CPO is in force, there is the possibility of a blight notice and the recovery of compensation. This option would be removed if the CPO is revoked. Nevertheless, an affected person may have incurred expenses in expectation of the CPO being implemented (for example, professional expenses for potential relocation). It seems reasonable in principle for such expenses to be recoverable if the CPO does not proceed

22. Acquiring authorities should be required to register CPOs and revocations of CPOs.

We agree that this proposal would seem to be a sensible approach.

23. Should there be a new Register of CPOs, or should an entry be made in the Land Register?

We suggest that if there is an appetite for a single register, then it would be more appropriate for the entry to be made in the Land Register. While professional searchers might know to look at a separate list, members of the public may not. To include the entry within the Land Register would help to ensure transparency and accessibility.

24. Is the current three year validity period of a confirmed CPO reasonable?

Yes.

25. Should there be a precondition that a CPO will only be confirmed where there is clear evidence that the project is reasonably likely to proceed?

The rationale behind this seems sensible but it may give rise to difficulties in practice. When is a project reasonably likely to proceed and who decides and on what criteria? In the absence of any evidence to suggest that the current mechanism is ineffective, then perhaps this does not need to be addressed.

Viability is an issue which can currently be addressed within the context of the need for the scheme to be justified in the public interest. It is questionable where there would be a benefit in adding an explicit "likelihood of implementation" test. As the current Circular

recognises, funding streams can be unpredictable and this is particularly the case for schemes involving housing associations where funding may be time-limited.

26. Where the acquiring authority offer to replace a public right of way which will be affected by a proposed development, should the right to insist upon an inquiry be removed?

Yes, however there should be some degree of scrutiny as to it being an appropriate replacement. We suggest that the procedure for replacement of a public right of way should be dealt with in similar procedural terms to a stopping up order with similar rights of appearance applying to both.

27. Where there is to be an inquiry into the loss of a public right of way, should any such inquiry be combined with any inquiry into the making of the related CPO?

This would appear to be the most cost-effective way to deal with it, and it may be sensible to combine both processes, but there may be other practicalities which would make it inappropriate.

28. Are there any other aspects of the process for making or confirming a CPO upon which consultees wish to comment?

We have no further comment.

Chapter 6 Challenging a (confirmed) CPO

29. Should the proposed new statute make it clear that objections to a CPO, on the basis of allegation of bad faith on the part of those preparing the Order are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?

We do not consider that this is necessary and it might not be sensible to include such a provision.

30. Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?

If the existence of bad faith is not enough to invalidate the process then, we would suggest, there should be a right to claim damages and it would seem appropriate and prudent for that to be stated expressly. In the event that the acquiring authority has acted in bad faith we consider it important that a statutory right to claim damages, is available to affected parties. Defining "bad faith" may be difficult and will require careful consideration. It would, however, be important to impose a time limit for bringing such a claim for damages in order to bring certainty to the process.

31. Do paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily?

On the whole, these provisions do operate satisfactorily, although the effect of the 6 week ouster clause is not particularly well known outwith those practising compulsory purchase or administrative law. We note that the six week ouster clause is consistent with many similar time limits in related legislation and has been imposed in order to provide certainty in decisions taken in the public interest.

32. Should any challenge to a CPO on the ground that it is incompatible with the property owner's rights under the Convention, be required to be made during the six week period challenge to a CPO?

This begs the question as to whether such strict time limits are compatible with the Convention. However, we believe that, provided that this requirement is in accordance with law and is necessary in a democratic society, then this should be Convention compatible. In addition, there is a public interest in the certainty generated by fixed deadlines. There will, however, be cases of hardship where parties suffer particular prejudice (i.e. loss of property) where they have failed to take a challenge within the six week period. This is a particular hardship where the party wasn't notified. Even if such a legal challenge is not taken, this does not affect in any way the potential claimant's right to compensation.

33. Are there circumstances in which such a challenge should be permitted to be made at a later stage?

Given that compulsory acquisition is proceeding in the public interest, which is argued to outweigh private interests, we have concerns if challenges could be made beyond the six week time limit period. Such a late challenge could potentially jeopardise major infrastructure projects.

34. When the applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than a quashing of the CPO either in whole or in part?

Yes, we see merit in the ability of the court to have a general discretion at its disposal in a successful challenge and in circumstances where the court has quashed a CPO in part only. For example, in relation to an un-notified party who should have been so notified, the court could order an inquiry or hearing in respect of that discrete interest, thus preserving the original CPO.

35. Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of any court challenge to the CPO?

If the CPO would otherwise lapse, then yes. Appeals can take a very long time, particularly if ECHR implications need to be considered in full.

Chapter 7 Implementation of a CPO

36. Any restatement of the law relating to compulsory acquisition should include provision along the lines of Sections 6 to 9 of the 1845 Act.

We agree. This will ensure consistency.

37. Should the proposed new statute list all the interests in respect of which a notice to treat should be served.

It is our understanding that notices to treat are rarely, if ever, used and on that basis we question whether this procedure should remain an option. If it is to be retained, then yes, the new statute should list all the interests on the basis that there can be full confidence that such a list could be certain of being complete.. Any changes to the list of statutory objectors in response to question 12 should be considered in the context of this question.

38. It should be made clear that the person claiming to be the holder of an interest in the land and who has not been served with a notice to treat, has the right to raise proceedings to determine (a) that the interest attracts compensation and (b) the amount of that compensation.

We agree that such a right should be made clear and an explicit provision should to be included in the proposed new statute.

39. Should there be a time limit within which such proceedings should be raised?

Yes, we agree such a right should be time limited. A period of between three to five years is suggested from the date on which the claimant became aware of the absence of service of the requisite notice to treat. Such a trigger should address circumstances where the claimant has previously been unaware of the existence of their interest giving rise to the need for service of a notice to treat.

40. Should a notice to treat be accompanied by information as to how compensation will be claimed?

Yes, we agree that notices to treat should be accompanied by such details and any contact details where further information and advice can be obtained.

41. Does paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice?

The provisions of Paragraph 7 of Schedule 2 of the 1947 Act are rarely invoked.

42. When fixing interest in land, should any action be taken or alterations be made before the service of the notice to treat be considered differently from any action taken or alterations made after such service?

Yes, because in the first scenario there is no certainty that the land is to be acquired. It is only after that notice to treat has been served, that the acquiring authority's intentions are certain. However, the detail of how this would operate in practice will require careful and detailed consideration. Also, it may be foreseeable that where there is substantial delay on the part of the acquiring authority and an affected party acts in good faith to prevent deterioration in trading levels or takes other action which would be considered reasonable, appropriate consideration should be taken.

43. Does the three-year term limit on validity of the notice to treat work satisfactorily on practice?

We understand that notices to treat are rarely, if ever, used and refer to our comments at question 37 above.

44. Should it be competent for an acquiring authority to withdraw a notice to treat and, if so, within what period?

It may be considered reasonable, in principle, that the acquiring authority should be entitled to withdraw a notice to treat, but the circumstances in which it is competent to do so should, in our view, be restricted.

45. Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after they have entered on the land?

We suggest that any such entitlement should be restricted in order to ensure that the landowner is not prejudiced by the withdrawal of a notice to treat. For example, although the landowner may have made alternative arrangements as a consequence of the acquiring authority having taken entry, the landowner may be agreeable to the withdrawal of the notice to treat subject to compensation. That is less likely where works have been undertaken and could depend on the nature of the property.

46. After the period after which entry can proceed, following a notice of entry, be extended to, say, 28 days?

Yes. Although that may cause some delay in urgent cases, the acquiring authority should be able to accommodate this in their project in the vast majority of cases. It will also serve to allow an owner of e.g. a residential property a more reasonable period within which to obtain advice.

47. Alternatively, should it be competent for a land owner to serve a counter notice within a set time limit following service of a notice of entry, whether or not the acquiring authority have entered on to the land?

We believe that this appears to be the less desirable of the options.

48. For how long should a notice of entry remain valid?

Any restriction in the period of validity is likely to be of some benefit to the affected owner as it would remove a degree of uncertainty. As for the acquiring authority, it should not be

prejudiced by such a restriction provided the notice of entry can be reissued and remain in effect.

This raises the question of whether there should be an overall restriction on the number of times a notice may be re-served, or whether there should be an overall restriction in the period of time such notices may remain effective.

49. Should the acquiring authority be required to serve notice of their intention to make a GVD on holders of a short tenancy or a long tenancy with less than one year left to run?

Yes. In both of these situations the law will imply a continuation if neither party takes steps to terminate. This will ensure that all legitimate, affected parties receive proper notice of the GVD. If the tenant was not aware of the existence of a potential CPO, this may cause prejudice.

50. Where a GVD applies to part only of a house, factory, park or garden, do the current provisions adequately safeguard the interests of the acquiring authority and the landowner and, if not, what alterations should be made?

It is important for the landowners to retain the right to serve a notice of objection to severance.

51. Should a GVD be available under all circumstances?

Yes

52. Are the time limits for implementing a GVD satisfactory?

Yes

53. Compensation should be assessed as at the date when the property vests in the acquiring authority and interest should run on compensation from that date.

In our view, this would appear to be reasonable.

54. Where the acquiring authority enter on to the land before it has vested in them, compensation should be assessed at, and interest on compensation should run from, the date of entry.

Again, this seems reasonable.

55. In a situation following on within Section 12 (5) of the 1963 Act, the date upon which compensation should be assessed and the date from which interest of the compensation should run, should be the date upon which reinstatement of the building on another site could reasonably be expected to begin.

We agree, this seems reasonable.

56. Should the proposed new statute confer upon the LTS a discretion to fix the valuation date different from any those mentioned above, where it appears the LTS to be in the interests of justice.

Yes, but in limited circumstances and the presumption should be that the valuation date is the date of vesting. However, the circumstances in which such discretion might be available need careful consideration. No examples or instances are provided. What, if any, parameters would apply? Would consideration need to be given to substantial prejudice?

There would be practical difficulties in claimants and acquiring authorities not knowing the date of valuation in advance of bringing proceedings before the LTS.

57. Where an acquiring authority are in genuine doubt as to whether or not they own a particular parcel of land which they intend to acquire, where title is in the Register of Sasines, should they be able to:

(a) Use a GVD in relation to the whole of the land; and

(b) Register the GVD in the Land Register.

Yes

58. The provisions of Section 84-86 of the 1845 Act should be repealed and not replaced.

We agree.

59. What, if any, alterations should be made to the time limits for the various steps involved in the implementation of a CPO?

We are satisfied with the current time limits.

60. Would a new method of implementation of a CPO, along the lines as described in paragraph 7.119, be preferable to continuing with the current two methods of implementation?

We refer to our comments at question 37 above.

61. If so, what features should it have in addition to, or in place of, those mentioned above?

We refer again to our comments at question 37 above.

Chapter 8 Conveyancing procedures

62. Where there has been a confirmed CPO the land can be transferred to the acquiring authority by means of an ordinary disposition registered in the Land Register.

We agree with this proposal.

63. Do consultees agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue, namely that:

(a) title to the land will vest in the acquiring authority at the end of the period specified in the GVD allowing the authority to take entry to the land, and

(b) registration in the Land Register will be required for the acquiring authority to obtain the real right of ownership?

Yes, we agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue as set out in (a) and (b) above. However, we do note that the Land Registration (Scotland) Act 2012 does not in its terms state that registration confers a real right.

64. The existing methods of transferring the land following a notice to treat should be replaced with a unitary method, to be known provisionally as a Compulsory Purchase Notice of Title. This would be executed by the acquiring authority.

We agree with this proposal.

65. Do consultees agree that, if the notice to treat and GVD procedures are replaced by a unitary procedure, there should be a single statutory method of transferring the land to the acquiring authority?

We agree with this proposal.

66. The acquiring authority should always obtain a valid title where they have used a method of transfer specified in the new legislation.

We agree with this proposal, provided that those who are entitled to compensation remain entitled following transfer, including those who may have lost the benefit of attached title burdens and conditions which have been extinguished at the point of transfer.

67. Should the Keeper be required to add a note on the Land Register stating that the title has been acquired by compulsory purchase?

Yes, we agree with this proposal. We suggest that where the title is acquired by compulsory purchase, the Keeper should also be required to remove from the title sheet any rights etc. extinguished by s.106 and s107 of the 2003 Act, and s194 of the 1997 Act, without the need for the applicant to expressly request their removal.

68. The acquiring authority may serve a notice to treat on any tenant and extinguish the tenant's right under the lease in return for compensation.

We agree. However, the change in approach (i.e. the lease being extinguished rather than acquired) should not adversely affect the compensation rights of those deriving title from the extinguished lease.

69. The acquiring authority may serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation.

We have no comments.

70. It should be made clear that, on the acquiring authority becoming owner of the land, any subsisting securities would be extinguished.

We agree, provided the security holder has been alerted at an earlier stage to the prospective compulsory purchase, has been given the opportunity to object, and will be compensated for the loss of the security.

71. Do the 1997 Act section 194 and the 2003 Act sections 106 and 107 require reform or consolidation?

We would suggest that clarification of when s.107 of the 2003 Act applies in practice would be helpful. We note that Paragraph 8.73 of the Discussion Paper states *"It has been suggested to us that it is perhaps unclear when section 107 will apply in practice. [Does s.107 apply where] (a) an acquiring authority could have obtained a CPO but did not, or (b) where a CPO was in place but was not used because a negotiated agreement was reached, or does it apply in both scenarios? In our view it is clear that when section 107 is contrasted with section106, and when the relevant part of the Report on Real Burdens, on which the provisions are based, is considered, the answer is both."*

In our view, it should not be necessary to refer back to this Discussion Paper for a view as to when section 107 should apply.

72. It should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent.

If CPO authorises acquisition of a lesser right, it seems sensible that there should be a system to record and register that acquisition quickly and easily. If the acquiring authority has to obtain the burdened proprietor's signature then this could cause delays in updating the register and enforcing any lesser rights required. Projects may depend on those rights and they shouldn't be subject to potential ransom opportunities from signatories. The Compulsory Purchase Notice of Title seems a practical solution.

Chapter 9 The Mining Code

73. Should provision along the lines of the Code be included in the proposed new statute and, if so, should any additions or deletions be made?

Yes as suggested in the modified version. It is worth examining the effect of these provisions on shale gas. While not minerals, we suggest that other subsurface activities

may also need to be considered, for example geothermal energy and ground water abstraction.

PART 3: COMPENSATION

Chapter 11 Valuation of land to be acquired – basic position

74. The concept of "value to the seller" should continue to reflect any factors which might limit the prices the seller might expect to receive on a voluntary sale.

We agree.

75. Should depreciation of the value of the acquired land, caused by its severance from the retained land, be taken in to account when setting its value.

On the basis of the iniquitous position identified in paragraphs 11.33 and 11.34 we consider that there is a case for the depreciation of the value of the acquired land caused by severance from retained land to be taken into account when assessing its value.

76. Does the current law take account of negative equity satisfactorily and, if not, what changes should be made?

Whilst we recognise the potentially harsh effects when property is compulsorily acquired on a descending then rising market, it is difficult to envisage what changes could be realistically made to the current position.

77. Provision along the lines of rules 2, 4 and 5 should be included in the proposed new statute.

We agree.

78. Should a test along the lines of the "devoted to a purpose" test be retained?

There seems to be merit in adopting the Law Commission's proposals to replace this with the "adapted and normally used" test but we should wish to know why that was not accepted in English legislative reform. We believe that there is a difference between "adapted" and "devoted".

79. In cases of equivalent reinstatement, should there be an onus on the claimant to show that the compensation assessed on the basis of market value (and the service, where appropriate) would be insufficient for the activity to be resumed on another site?

We believe that there is merit in this proposal.

80. Should the LTS be entitled to impose conditions on the payment of equivalent reinstatement compensation in order to ensure that such compensation is properly used for the reinstatement in question?

In line with the 'good faith' requirements for this particular provision, we consider it important for the LTS to exercise a degree of control to ensure that the compensation awarded is applied to equivalent reinstatement.

Chapter 12 Valuation of land to be acquired – rule 3 and "no scheme" world

81. How should the "scheme" be defined?

The scheme is the project underpinning the CPO and there are difficulties and uncertainties in a clear cut statutory rule that requires the effects of the scheme to be disregarded in the assessment compensation. We would support a statutory mechanism to disregard the scheme.

82. Should an increase in the value of the land being acquired as a result of the scheme be taken in to account for the purposes of assessing compensation?

No, because that would lead to owners receiving more than fair compensation. Value should be assessed on value to the owner and not value to the purchaser. This could also frustrate projects by importing excessive compensation.

83. To what extent should an increase in the value of the land being acquired, as a result of the scheme, or the effect of the scheme on other land being acquired, be disregarded?

We refer to our comments at question 83 with regard to the first part of the question. We are unclear what is meant in the second part and would welcome a clarification.

84. Should any such disregard be limited by reference to the time elapse since the adoption of the scheme or, if not, on what alternative basis should or might it be limited.

Such a time elapsed limitation of a disregard appears equitable.

Chapter 13 Valuation of land to be acquired – establishing development value

85. Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?

We do not consider that the statutory assumptions should apply to "other land" as that may well lead to additional complexities and confusion. However, we do understand that in practice it is sometimes difficult to grapple with the application of planning assumptions attributable to an acquired plot in isolation from what would otherwise be a larger development.

86. Any existing planning permission should continue to be taken in to account when assessing the land to be acquired.

We agree.

87. What should be the relevant day for determining whether or not there is planning permission of the land to be compulsory acquired?

We note that there is frequently a discrepancy between the relevant date for planning assumptions and the date of the valuation. We consider that the appropriate date should be the relevant valuation date as has been amended in the parallel Land Compensation Act 1961 as amended.

88. Should there continue to be a statutory assumption that planning permission would have been granted if the acquiring authority's proposals if it were not for the compulsory purchase?

We agree.

89. If so, should this continue to be limited to (a) the planning permission which might reasonably be expected to be granted to the public and (b) by the Pointe Gourde principle?

We are in agreement with this statement. However, in answer to this question, and question 88 above, there is of course the position whereby, although the statutory assumption that planning permission would have been granted is taken into account, the valuation requires to be assessed in a no-scheme world.

90. The statutory assumption of planning permission for the development in terms of paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

We agree with this proposition in order to avoid windfall cases such as Greenweb.

91. Should the statutory assumption of planning permission for development in terms of paragraph 2 of Schedule 11 to the 1997 Act be repealed?

Yes, we agree this should be repealed.

92. In terms of special assumptions in respect of certain land comprising development plans, what should be the relevant date referring to the applicable development plan?

We consider that the "relevant date" should be the date of the notice to treat or the date on which a GVD is made.

93. The underlying "scheme" should be deemed to be cancelled, for the purposes of considering statutory planning assumptions, the time when the CPO is first published.

This is reasonable. However, we consider that it would be important to clarify what is meant by when the CPO "first published". If this is meant to be when the CPO is first notified (i.e. prior to confirmation) then we consider that is the appropriate date.

94. The scope of the underlying "scheme" to be deemed to be cancelled for the purposes of considering statutory planning assumptions should be the entire scheme and not simply the intention to acquire the relevant land.

We agree with this proposition, as to do otherwise would lead to additional confusion. If the proposal as set out in 93 (above) is taken forward, then this should follow.

95. Provision along the lines of Section 14 of the 1961 Act, as amended, should be included within the new statute.

We agree.

96. Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

In the interests of fairness to potential claimants, we consider that it should not be repealed and should be re-enacted.

97. If not, should the period for considering subsequent planning permission remain as 10 years?

We consider that 10 years strikes a reasonable balance in time to enable the claimant to receive additional compensation should a planning event occur which increases the value of land which would not have been in contemplation when his claim was settled.

Chapter 14 Valuation of land to be acquired – CAADs

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

We consider that the current statutory arrangements that apply under Section 25 (1) and (2) are adequate.

99. Do CAADs currently provide sufficient information and, if not, what further information should they provide?

Experience is variable across Scottish Planning Authority Areas and there would be merit in some form of standardisation in order to assist practice, perhaps by way of standard application forms and an updated Scottish Statutory Instrument. Particular issues are the relevant date and the future date, use of conditions and section 75 agreements.

100. Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.

We consider that it would be important to include an amendment, the effect of which would mean that CAADs are to determine planning prospects as at the relevant valuation date as is currently the case with the 1961 Act as amended.

101. When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, and no assumption should be made about what may or may not have happened before that date.

We agree.

102. The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.

We agree.

103. The same cancellation assumptions should apply to consideration of all potential planning consents, including CAADs.

We agree.

104. Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

We believe that this would bring greater clarity to the position.

105. Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?

CAAD appeals raise invariably complex issues and we believe that these would best be served by preserving the party's entitlement to insist upon a public inquiry when appealing a CAAD decision.

106. Should there be any change in the current (one month) time limit for appealing against a CAAD?

We believe that the time limit should be extended to 3 months, which would make this consistent with other planning legislation.

107. Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?

We do not consider that the appeal should be made to the LTS. CAAD appeals invariably involve planning issues and it is considered that these are best dealt with through the DPEA by way of an appointment of a Reporter to consider the issues and report to Ministers. We do appreciate that CPOs are sometimes made by Scottish Ministers and they are the confirming authority under the 1947 Act. There may be some merit in having the appellate function in relation to CAADs placed with the LTS. On balance we consider that the current arrangements work well and should be retained.

108. If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?

In these circumstances, we consider that a DPEA Reporter will likely possess sufficient knowledge of the planning issues in order to interrogate the issues and report thereon. We consider that the decision should be made by the Scottish Ministers.

109. Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?

We agree with this statement on the basis that there should be consistency between Section 25 and Section 24 of the 1963 Act.

110. Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?

That appears to be the current practice and we see no reason to alter this.

111. In any event, should the same criteria be applied in relation to all relevant planning assumptions?

This in our view, would seem logical.

Chapter 15 Consequential loss – retained land

112. The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.

We agree.

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affliction should be carried out on a "before and after" basis.

We agree. This seems reasonable.

114. Claims for injurious affection should be assessed as at the date of severance.

We agree.

115. Compensation for injurious affection, properly so called should be limited to the damage caused to the market value of the retained land.

This seems reasonable, provided other losses are recoverable as a disturbance claim or other consequential loss.

116. The proposed new statute should confer a discretion on the acquiring authority to carry out accommodation works.

This seems reasonable, subject to such works being accepted by the affected party or parties.

117. Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land" satisfactory?

The reference to "adjacent land" will cause difficulties as to where the limits of this adjacency lie.

118. The provisions which require any betterment to the retained land to be set off against compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

Yes, this seems reasonable. The other sensible proposal is that made by the DETR Review (at para 15.62) that betterment should only be set-off against compensation for injury caused to the retained land and should not affect the other heads of compensation payable to the landowner.

Chapter 16 Consequential loss - disturbance

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

This seems reasonable**.**

120. There should be an express statutory provision for disturbance compensation.

We agree.

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?

We agree.

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of the notice of the making of the CPO.

This seems reasonable and we agree. However, in stating this, it may well be that the scheme has impacted by way of disturbance prior to the making of the CPO and this needs to be carefully considered

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

We agree.

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lose of development potential?

This seems reasonable and we agree.

125. Should the proposed new statute enable the investment owners to claim a wider range of disturbance compensation?

We consider that there is merit in an amendment similar to the 1963 Act amendment.

126. Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved?

We do not consider that the current rules are sufficiently clear but acknowledge the complexity of legislating in this area.

127. Should the proposed new statute remove the impecuniosity rule as it has been established at common law?

This seems reasonable. We agree that there should be some clarity given in the statute as to the applicability of a reasonable foreseeability test in disturbance payments.

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?

We do not consider that they should and note that there are other payments that are designed to offset hardship (e.g. home loss payments, which take account of the personal nature of dispossession).

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

This seems reasonable and we agree with this statement generally. However, we consider that it could result in unduly harsh consequences for claimants as, until the CPO and GVD are made, there is no certainty that the land will be acquired. The duty should not be a particularly high one with the claimant only being required to take reasonable steps.

130. It should be clear that relocation compensation may be available even when it succeeds the total value of the business.

We agree.

131. Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute if and, if so, what, if any, modifications should be made to them?

We agree that they should. This is a complex area and we would not wish to offer modifications at this stage.

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily purchased land and particularly where the GVD procedure is used?

We consider that the valuation date for disturbance compensation should be different from the valuation date where the GVD procedure is used. We also note that some of the elements making up a disturbance claim (e.g. professional costs) will be incurred after the vesting date.

133. Should it be made clear, in the proposed new statute, that a claim for a disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

This seems reasonable, but the period of time should strike a balance between achieving this and not resulting in hardship to the claimant.

134. Section 38 of the 1963 Act should be repealed and not re-enacted.

We agree.

135. Should disturbance payments along the lines of those currently provided for by sections 34 and 35 of the 1973 Act be retained?

We agree, they should be retained.

136. Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?

This would appear to be sensible and we agree that they should be retained.

Chapter 17 Non-financial loss

137. Should the minimum period of residence necessary in order to qualify for a mandatory home loss payment be increased and, if so, by how much?

No, it should remain as one year.

138. Should the current system, of calculating home loss payments are a percentage of market value, be retained?

We agree and note the current maximum and minimum.

139. If so, should primary legislation provide for the periodic review of the relevant maxima and minima over an automatic increase (or reduction) to reflect inflation?

This seems reasonable.

140. As an alternative, should a system, either of a flat rate payment or of an individually assessed payment individually assessed in each case, be introduced?

We refer to our response at question 139 above.

141. Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural owner?

This seems reasonable. We consider that there is a case to introduce greater flexibility and to make the existing provisions less onerous on the agricultural landowner.

142. The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.

This seems reasonable.

PART 4: RESOLUTION OF DISPUTES; CRICHEL DOWN RULES; MISCELLANEOUS MATTERS

Chapter 18 Process for determining compensation

143. Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

We agree.

144. What evidence can consultees provide of shortcomings in the current LTS procedures for determining disputed compensation claims, and what changes should be made?

The LTS is the forum of last resort and cases can be complex. The adoption of a stricter timetable for pleadings would probably accelerate cases. Perhaps simpler cases or those of lower value can be fast-tracked?

This is a highly specialised area and the LTS is very much a specialist court and this is to be acknowledged and welcomed.

145. Where land is compulsorily purchased which is subject to a tenancy of under one year, disputes about compensation relating to a tenancy should be referred to the LTS rather than the sheriff court.

We agree.

146. Should it be made clear in the proposed new statute that a six- year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?

It would be sensible for this statutory time bar to be stated in terms and we consider that it would be important to highlight this critical deadline.

147. Should it be made clear in the proposed new statute that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD.

Yes, we agree.

148. What, if any, changes should be made to the time limit to claim compensation?

Six years may be considered to be too long in most cases. If a settlement is to be agreed then it is likely to have been agreed in less than six years in all but the most complex cases. Bringing evidence after that time can add to the cost. There needs to be adequate time for

these discussions but a period of 5 years, in line with the prescription period in Scotland, would appear adequate. We do not believe that any change is necessary.

149. Should the LTS be given discretion to extend the time limit in some circumstances?

We consider that it may be helpful to provide that the LTS can, in exceptional circumstances, accept claims outwith the six year time limit. However, there are arguments both ways here. On one view an extension of the period has some advantages, particularly in complex cases. On the other hand, there is advantage in certainty, particularly for applicants, and an inflexible deadline can focus minds. If an extension would only be used in the most complex cases, the resources available to such applicants are likely to be such that making the application to the LTS is not unfeasible anyway. There is also something to be said for the fact that preparing the application can in itself focus minds on the strengths and weaknesses of the applicant's position.

150. Should the current rules and expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than has been offered?

Yes, we do consider that the LTS should be provided with a wider discretion to make such awards. However, this should also be balanced against time and expense wasted by parties either not been given as full information as they might have been, or not having taken legal advice when they could/should have done.

151. Should provision be introduced to allow the LTS to make an order at an early stage to limit the expenses of a claimant in appropriate cases?

This seems reasonable. On an equality of arms point where the acquiring authority is well funded, this may have a role to play.

152. There should be a prescribed form to claim an advance payment.

This seems reasonable. This may also assist with perceptions of accessibility of the LTS.

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

This may not be desirable and there would need to be safeguards for repayment if title was not taken.

154. Should it be competent of the LTS to provide an enforceable valuation figure for an advance payment?

We consider that this may be helpful, however this may be problematic. If the LTS is to provide an enforceable valuation figure for an advance payment, then how will the LTS maintain its impartiality in such cases? It would need to be carefully implemented to avoid suggestions of favouring one party over the other. The valuation would need to be provided externally, but that in itself may give rise to difficulties if the same firm or individual happened to be instructed by an applicant or respondent in a different case.

155. At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?

We think that judicial interest is too high. We suggest a figure related to base rate, though bearing in mind that someone who is in need of the advance payment may not be able to borrow at commercial rates. However, we consider that the interest rate should be sufficient to encourage the acquiring authority to pay within a reasonable time.

156. It should be competent, where all parties agree, for an advance payment to be made to the landowner where land is subject to a security.

We see no difficulty with this. It could be prejudicial to applicants whose land is subject to a security otherwise.

157. Should the LTS have discretion to:

(a) provide for interest from the date earlier than its award; and

Yes.

(b) increase the right of interest where it finds that there has been unreasonable conduct by an acquiring authority?

This is usually taken into account in expenses rather than interest, and that seems more appropriate.

158. What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR and (b) reference to the LTS?

Reference to the LTS has the advantage of procedural certainty and the same decision-maker each time. ADR can be a cheaper and more efficient process but it is often private and there is an advantage to there being a body of publicly available decisions on a topic like this. In addition, it is more difficult to appeal a decision following ADR, and the only appeal is to the Court of Session on restricted grounds. This would be more expensive and time consuming. There may be advantage in the LTS having power to remit to ADR but we question this being a requirement.

159. Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR and (b) reference to the LTS?

We are not in a position to provide evidence, but would doubt on the whole that there would be much difference. Expert evidence is likely to be required either way, as is some form of representation. Lands Tribunal fees are low compared to a privately appointed arbiter or mediator.

Chapter 19 Crichel Down Rules

160. Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

We consider that this depends on the answer to question 161. If the rules are to be made statutory and, in particular, if they are to be applied to private sector organisations who hold land which was purchased under compulsory powers, then legislation may be necessary.

In the event that the rules were to be placed on a statutory footing, then consideration would need to be given as to how they would sit with other pre-emptive rights such as community right to buy.

161. Should the Rules apply to all land acquired by, or under threat of, compulsion?

The current wording of the Rules can give rise to confusion as to their status. In particular what is meant by bodies being "expected to apply" or "recommended to apply" the Rules?

Although the court in the case of Findlay's Executor v West Lothian Council [2006] CSOH 188 found that the interpretation of the Rules was primarily a matter for the decision-maker, the case pre-dates the Supreme Court decision in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13. The interpretation of the Rules would, it is submitted in light of the Tesco case, be a matter of law. Consideration should perhaps be given to providing greater clarity on the application of the Rules.

162. Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

There is a lack of an explicit philosophy for the Rules which makes it difficult to form a logical conceptual framework for exceptions to them. On the assumption, however, that the intention is to enable former owners to re-use land for the purposes which they previously used it for, then the basis for offering back the land might be said to be removed if there is a material change to the character of the land

163. Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory?

These are considered to be satisfactory.

164. Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?

Although there may be a justification in principle for agricultural land being subject to a longer time limit, it is administratively simpler to have a single time limit for all land.

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?

For property acquired under historical CPO powers, application of the Rules can be a significant burden, even in terms of ascertaining whether the land was originally used for agricultural purposes. The introduction of a time limit for pre 1992 purposes would seem sensible.

166. Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

The existing exceptions are considered satisfactory.

167. Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

We have no comment.

168. Do the time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

The views expressed in the STLR report on whether the timescales are realistic are considered equally valid in Scotland. In particular, the 2 month time limit for a former owner to confirm whether they wish to purchase the property has practical difficulties. Receipt of the formal notice may be the first time the former owner has received an indication that the land is surplus and it may be difficult to obtain the requisite advice and, in the case of non-natural persons, to make the required decision.

169. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

We refer to our responses at questions 96 and 97. If the equivalent to Part V is to be retained with an amended timescale, it seems reasonable in principle for similar timescales to apply to land sold back to former owner under the Rules.

170. The LTS should have general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land.

In principle, there may be a benefit in having such matters determined by the LTS. However, that would seem to be dependent on the Rules being placed on a statutory footing, with greater clarity being given on the circumstances in which they need to be applied.

Chapter 20 Miscellaneous Issues

171. Should section 89 of the 1845 Act be repealed and not re-enacted?

Yes, we agree

172. The law on the taking of enforcement action should be amended so as to make it clear that a third party under a back-to-back agreement is entitled to enforce possession by virtue of the CPO.

Yes, we agree.

173. Does section 114 of the 1845 Act work satisfactorily?

We have no comment.

174. Where a short tenancy is compulsorily acquired, should account be taken, for the purposes of assessing compensation, of the likelihood that it will be continued or renewed?

This would seem to be a reasonable approach.

175. Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.

We agree.

176. Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?

Yes.

177. Are there any other aspects of the current compulsory purchase system, not mentioned in this Paper, to which consultees would wish to draw our attention?

We have no comment.

For further information and alternative formats, please contact:

Brian Simpson

Solicitor, Law Reform

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR
www.lawscot.org.uk